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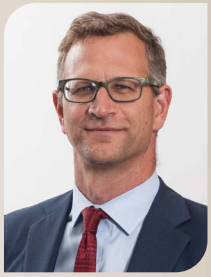

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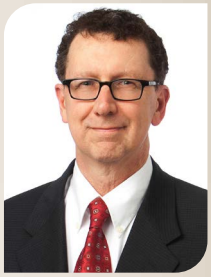

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The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy and environmental protection, and housing development.

Supreme Court to review *McGirt v. Oklahoma*

McGirt, a member of the Muskogee Creek Tribe, was convicted in Oklahoma state court of sex crimes against a minor within the historical Creek Indian reservation. The court rejected his argument that the court lacked jurisdiction over a crime allegedly committed by an Indian in Indian country and that sole jurisdiction lay with the federal government. The Oklahoma Court of Criminal Appeals affirmed. On Dec. 13, the U.S. Supreme Court agreed to review the decision. The case raises the issue whether certain acts of Congress in the early 20th century had the effect of disestablishing the reservations of the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations. The same issue has been pending in the Supreme Court for over a year in the case of *Sharp v. Murphy*. In *Murphy*, the Tenth Circuit had ruled that the Creek reservation had never been diminished or disestablished and that the state courts lacked criminal jurisdiction, upending century-old assumptions. At the end of the 2018-19 term, the Court ordered *Murphy* reargued, possibly because Justice Gorsuch had recused himself and the remaining justices were evenly split. Assuming Gorsuch does not recuse himself in *McGirt*, that case will provide the justices an opportunity to decide whether the Creek and similarly situated historical reservations survive.

Summaries of Selected Court Decisions

In *Red Cliff Band of Lake Superior Chippewa Indians v. Bayfield County*, 2020 WL 108672 (W.D. Wis. 2020), Bayfield County had asserted the right to impose its zoning ordinances on members of the Red Cliff Chippewa Band of Lake Superior Chippewa (Tribe) residing on fee land within the boundaries of the reservation established for the Tribe under the LaPointe Treaty of 1854. The County's argued that provisions in the 19th Century allotment acts permitting alienation of allotted lands, which the Supreme Court in County of *Yakima v. Confederated Tribes and Cass County*, *Minnesota v. Leech Lake Band* had cited as congressional authorizations for counties to impose property taxes, necessarily subjected member-owned fee lands to county regulatory authority. The County also cited *City of Sherrill v. Oneida* and several New York district court decisions affirming county zoning authority on equitable grounds. The federal district court rejected these argument and granted the Tribe summary judgment, relying on fundamental principles of federal Indian law set forth in the Supreme Court's decisions in *Worcester v. Georgia*, *Williams v. Lee*, *McClanahan v. State Tax Commission* and *White Mountain Apache v. Bracker* and embracing the reasoning of the Ninth Circuit in its 2002 *Gobin v. Snohimish County* decision: "[T]hese cases reinforce a general principle, which remains in place today, that a state may not regulate activities on tribal reservations and of tribal members on reservations absent express congressional authority. … Of particular importance to the Ninth Circuit's analysis was the distinction drawn in County of Yakima, and reaffirmed in Cass County, between Congress's authorization of 'State ad valorem property taxes' on feely alienable fee lands and refusal to find similar authorization of a State's 'excise tax' on proceeds obtained by Tribal members in selling those same lands. … For the same reason, the Ninth Circuit concluded that '[u]nlike the inextricably linked concepts of (forced) alienation and taxation found in County of Yakima, alienation and plenary

in rem land use regulation are entirely unrelated.' … The court agrees with this holding. Even assuming the language in the Dawes Act and Burke Act are applicable to this case and authorize taxation of the land itself, there is no express authorization by Congress for the County to apply its zoning ordinance on fee simple land owned by the Tribe or its members within the boundaries of the Reservation. The question then is whether the alienability of reservation land (and, more specifically, Congress's authorization of the alienability of that land) somehow establishes Congress's authorization for a county to apply its comprehensive zoning ordinance to land held by tribal members in fee simple in a reservation. Here, for two core, interrelated reasons, the court holds that it is not reasonable to rely on alienability generally to find express authorization for zoning of land held by tribal members on a reservation by a county. First, nothing in County of Yakima and Cass County undermines Supreme Court jurisprudence that courts must construe congressional authority narrowly. To the contrary, the Court in County of Yakima reinforced this: "The short of the matter is that the General Allotment Act explicitly authorizes only 'taxation of ... land,' not 'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land.' … Second, zoning does not solely concern the regulation of land itself, like property taxation or condemnation. Instead, as described in the facts above, the County's comprehensive zoning ordinance attempts to regulate both fixtures and improvements on a property, as well as its uses and activities on it." Godfrey & Kahn represented the Tribe in the case.

In *Allen v. United States*, Fed. Appx. 2019 WL 7369426 (9th Cir. 2019), Allen and others claiming to be "persons of one half or more Indian blood" sued the U.S. Department of Interior (DOI) under the Administrative Procedure Act (APA) challenging DOI's determination that they were ineligible to organize as a "tribe" under the Indian Reorganization Act (IRA) and its implementing regulations. The district court granted the government summary judgment and the Ninth Circuit affirmed: "Appellants' principal dispute is that despite recognizing that Appellants possess one-half or more Indian blood and reside on the Rancheria, Interior determined that they cannot organize as a tribe because they are 'only a subset of the Indians for whom the Pinoleville Rancheria was set aside.' Most problematic, in Appellants' view, is Interior's further statement that it 'does not interpret the Indian Reorganization Act as permitting splinter groups or factions of a tribe to set up independent tribal government.' Appellants contend that Interior improperly considered a factor from the **federal acknowledgment** regulations that goes beyond the criteria set forth in 25 U.S.C. § 5129 and 25 C.F.R. § 81.1(w)(2). We disagree. By referencing the term 'splinter group,' Interior did not consider additional criteria, nor did it cite or reference the acknowledgement regulations. Interior's use of the phrase 'splinter group' merely supported its factual finding that Appellants were 'only a subset' of the Indians for whom the Rancheria was set aside. And nothing in the settlement agreement prohibited Interior from considering prior decisions that inform its interpretation of the statutory and regulatory criteria. Moreover, substantial evidence supports Interior's conclusion that Appellants are a 'subset' of the Indians for whom the Rancheria was set aside."

In *Bay Mills Indian Community v. Whitmer*, Fed. Appx. 2019 WL 6824855 (6th Cir. 2019), Congress in 1997 had enacted the Michigan Indian Land Claims Settlement Act (MILCSA). Section 107(a)(3) of MILCSA provided: "The earnings generated by the Land Trust shall be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land acquired with funds from the Land Trust shall be held as Indian lands are held." The Bay Mills Indian Community (Tribe), a beneficiary of the MILCSA, purchased land in Vanderbilt, Michigan, 125 miles south of the Tribe's reservation, with earnings from the Land Trust and sought to operate a casino on the site pursuant to the **Indian Gaming Regulatory Act** (IGRA) which permits tribes to operate casinos on "Indian lands." IGRA defines "Indian lands" to include land that is "held by any Indian tribe ... subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." The tribe submitted, and then withdrew, applications to the National Indian Gaming Commission (NIGC) to amend its gaming ordinance to permit gaming at the Vanderbilt site and opened a gaming facility without an amendment. The NIGC sought a legal opinion from the Solicitor of the U.S. Department of Interior, who determined that the Vanderbilt site did not meet IGRA's definition of Indian lands. The State of Michigan sued to enjoin operation of the casino. Pursuant to the parties' stipulation, the district court addressed only the issue whether the phrase "held as Indian lands are held" in the MILCSA constituted land "subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power" and decided the issue in the state's favor. The Sixth Circuit disagreed with the limited scope of the district court's inquiry and remanded for further

consideration of other issues, including whether the Vanderbilt parcel had been purchased with Land Trust funds, the potential geographical limitation on land purchases under the MILCSA and the impact of the applications to the NIGC: "In sum, we remand for the district court to consider whether the parties' apparent factual disagreement regarding the funds used to purchase the Vanderbilt parcel is a 'genuine dispute' of 'material fact' that precludes summary judgment. Fed. R. Civ. P. 56(a). If it is not, and a party 'is entitled to judgment as a matter of law,' the district court should consider the proper interpretation of § 107(a)(3) as a whole and in context."

In *Rosales v. Dutschke*, Fed. Appx. 2019 WL 6745078 (9th Cir. 2019), Rosales sued BIA and officials of the Jamul Indian Village (Tribe), contending that the Tribe's construction of a casino unlawfully disturbed human remains and funerary objects. The district court dismissed for failure to join the Tribe as a party. The Ninth Circuit affirmed: "Federal Rule of Civil Procedure 19 requires the dismissal of a case where an absent party has an interest in the litigation that would be impaired if the litigation were to proceed in its absence, joinder of that party is unfeasible, and the action could not proceed in equity and good conscience without it. … The Tribe has a substantial interest in this litigation because the complaint contends that the Tribe does not exercise governmental power over the land on which the casino was built. Plaintiffs'-Appellants' claims turn largely on the status of this land. On appeal, Plaintiffs-Appellants do not dispute the district court's conclusion that joinder of the Tribe is unfeasible because it is immune from this suit under the doctrine of **tribal sovereign immunity**. Even assuming that the Tribe's sovereign immunity does not extend to its officers here because they are properly sued in their personal capacities, the interests of those individuals in defending a claim for damages may not align with those of the Tribe."

In *Temple v. Roberts*, 2019 WL 6528215 (D.S.D. 2019), Temple sued officials of the BIA after the BIA impounded his cattle. Temple served subpoenas on Mesteth and Provost, employees of the Oglala Sioux Tribe (Tribe). Relying on The Eighth Circuit's holding in *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1105 (8th Cir. 2012), that a federal court third-party subpoena in private civil litigation is a "suit" for purposes of tribal **sovereign immunity**, the Court quashed the subpoena: "*DeJordy* did not limit its holding to third-party subpoenas served in a suit seeking money damages as opposed to those served in other suits. Plaintiff provides no rationale for distinguishing *DeJordy* in cases not involving money damages and the court perceives none. *DeJordy* turned on the concept of tribal sovereign immunity, which does not depend on the nature of the underlying suit."

In *Chegup v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 2019 WL 6498177 (D. Utah 2019), the Ute Tribe had sued the federal government over ownership of lands claimed by the Tribe. Chegup and certain other members sought to intervene in the suit to make allegations that contradicted the Tribe's. As a result, the Tribe banished them for five years. They sued in federal court, claiming that Defendants violated their rights under the Due Process Clause of the **Indian Civil Rights Act** (ICRA) by not informing them of the charges against them or permitting them to confront witnesses, resulting in loss of their homes, employment, retirement plans, health insurance, healthcare and access to tribal ceremonies and cultural events. The Court dismissed on the ground that the five-year banishment did not rise to the level of an actionable "detention" under the habeas corpus provisions of the ICRA: "[V]irtually every court that has had occasion to address banishment under Section 1303 has concluded that only permanent banishment—not temporary—is sufficient to meet the detention requirement under Section 1303. … The court therefore joins the clear weight of authority and concludes that for banishment to constitute detention under Section 1303, it must be permanent. Thus, because Plaintiffs' banishment is of a limited duration, they have failed to establish the 'in custody' requirement."

In *Neighbors Against Bison Slaughter v. National Park Service*, 2019 WL 6465093 (D. Mont. 2019), the U.S. National Park Service (NPS) in 2005 had opened 40 acres of public land near Yellowstone National Park to hunters. Six tribes asserted that they had **reserved the right to hunt** the tract, which does not lie within any existing reservation, in treaties with the United States. Neighbors sued the NPS, claiming that the hunt posed a safety threat, risked spreading brucellosis and made it difficult to rent cabins to tourists. The district court denied their motion for a preliminary injunction: "Here, the balance of hardships and public interests weighs heavily in favor of the Defendants and the public, particularly the Tribes. The Plaintiffs argue the threat to public safety and contracting Brucellosis weigh in favor of granting the injunction. But the Court has already determined, based on the Plaintiffs' evidence, that those risks are not likely. On the other hand, the hardship imposed on the Tribes is likely. The Tribes rely on bison hunting

for subsistence, they use bison hides for clothing and other items, and the hunt itself serves as cultural preservation. Furthermore, the Tribes have had no time to plan for an abrupt halt to the bison hunt. They have been planning for months on the fair assumption that the 2019 bison hunt, which was approved in December 2018, would go forward. Balancing the loss of subsistence and cultural preservation against the unlikely risks to the Plaintiffs or public at large, the Court finds the balance of hardships and public interests tips heavily against the Plaintiffs."

In *Video Gaming Technologies, Inc. v. Rogers County Board of Tax Roll Corrections*, 2019 WL 6877909 (Okla. 2019), Rogers County, Oklahoma sought to impose **ad valorem tax on electronic gaming equipment** owned by Video Gaming Technologies, Inc. (VGT) and leased to the Cherokee Nation through its business entity, Cherokee Nation Entertainment, LLC (CNE). VGT appealed to the Rogers County Board of Tax Roll Corrections (Board), contending that the tax was preempted by the Indian Gaming Regulatory Act (IGRA), Indian Trader Statutes and federal common law. After the Board rejected the challenge, VGT petitioned for judicial review in the county district court, which also rejected VGT's arguments. The Oklahoma Supreme Court reversed. Rejecting a contrary conclusion reached by the Second Circuit in *Mashantucket Pequot Tribe Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013), the Court found that the tax was preempted by the IGRA and under the principles of *White Mountain Apache v. Bracker*: "We find IGRA's regulations governing gaming are comprehensive and pervasive. … While ownership of gaming equipment does not automatically subject it to IGRA, when the gaming equipment is used exclusively in a tribal gaming operation, such as with Nation, we find it is inextricably intertwined with IGRA gaming activities such that it is absolutely directly related to and necessary for the licensing and regulation of gaming activity. … Due to the comprehensive and pervasive nature of IGRA, the number of federal policies threatened, Nation's sovereignty, and County's lack of justification other than as a generalized interest in raising revenue, we find that taxation of gaming equipment used exclusively in tribal gaming is preempted."

In *Walter v. Oregon Board of Education*, 301 Or.App. 516 (Or. App. 2019), the Oregon legislature had enacted a statute permitting school districts to "[e]nter into an approved written agreement with the governing body of a federally recognized Native American tribe in Oregon to allow the use of a **mascot** that represents, is associated with or is significant to the Native American tribe entering into the agreement." Walter, taking the position that Native American mascots were harmful regardless of agreements with tribes, challenged the law and implementing regulations under the Equal Protection Clause of the Fourteenth Amendment for "singling out Native American mascots for a different standard than applies to any other racial mascots." The Oregon appellate court upheld the statute and regulation on the ground that it could not assess the harm alleged by the plaintiff: "Because we cannot determine the facts on which petitioner's race-based equal protection challenge depends, we reject petitioner's equal protection contention that OAR 581-021-0047(4) is invalid on its face because Native American mascots are categorically harmful. … The rule bears a rational relationship to the state's legitimate goal of creating opportunities, through intergovernmental agreements, for federally recognized Native American tribes to be involved in decisions regarding the appropriate use of Native American mascots of significance to Oregon tribes, in order to combat negative stereotypes that are harmful to Native American students and to dispel misconceptions about Native American people."

In *Minnesota v. Northrup*, 2019 WL 6838485, Not Reported in N.W (Minn. App. 2019), Northrup, a member of the Fond du Lac Band of Minnesota Chippewa, was convicted of setting a gill net in Gull Lake in violation of state law. Northrup moved to dismiss on the grounds that the Chippewa Tribe had retained usufructuary fishing rights in the lake under an 1864 treaty with the United States and that the lake was Indian country and the state lacked jurisdiction. The trial court denied the motion on the ground that, while the Chippewa of the Mississippi, Leech Lake, and Lake Winnibigoshish bands retained usufructuary rights on the ceded land, the Fond du Lac Band did not. On appeal, a majority of a three-judge panel held that (1) the lake had been ceded in the 1864 treaty and was no longer Indian country, and (2) usufructuary rights had not been reserved to all Chippewas in previous **treaties acknowledging aboriginal title**: "Collectively, therefore, the treaties Northrup relies upon did not provide for any express reservation of usufructuary rights to Gull Lake, and instead only recognized the Chippewa Tribe's aboriginal right to occupancy of the land, to which the right to hunt, fish, and gather is incidental. This distinction is crucial because the court in *Keezer* also recognized that when hunting, fishing, and gathering rights exist only by virtue of the right of occupancy rather than by express reservation in a

treaty, the extinguishment of Indian title to the land has the effect of abrogating these use rights as well."

In *State v. Bellcourt*, 2019 WL 6834143 N.W.2d (Minn. App. 2019), Byrne, a Minnesota-licensed peace officer employed by the White Earth Chippewa Tribe, arrested Bellcourt outside the reservation pursuant to a report of a traffic violation. Bellcourt moved to suppress on the ground that Byrne lacked **jurisdiction** off the reservation. The trial court denied the motion and the Court of Appeals affirmed, holding that a state-licensed tribal officer is authorized to seize and arrest a person outside the boundaries of the tribe's reservation for an offense that occurred outside the boundaries of the reservation if the officer is within the course and scope of employment for purposes of Section 629.40, subdivision 3, of the Minnesota Statutes, which provides: "When a person licensed under section 626.84, subdivision 1, … in the course and scope of employment or in fresh pursuit as provided in subdivision 2, is outside of the person's jurisdiction, the person is serving in the regular line of duty as fully as though the service was within the person's jurisdiction." The Court rejected Bellcourt's argument that the cooperative agreement between the Tribe and the County barred Byrne's extra-territorial arrest: "[T]he cooperative agreement confers some law-enforcement authority on White Earth tribal police officers when they are *on* the White Earth reservation. But no provision of the cooperative agreement refers to law-enforcement services or public safety in those parts of Becker County that are *off* the White Earth reservation. The cooperative agreement simply is not concerned with whether White Earth tribal police officers may or may not engage in any law-enforcement services outside the boundaries of the White Earth reservation. Thus, the cooperative agreement does not limit the course and scope of Officer Byrne's employment to the geographic area of the White Earth reservation."

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